FINAL REPORT OF THE LOCAL RULES ADVISORY COMMITTEE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

April 20, 2000

CHAIRS

Karen Norris, San Antonio
Shannon Ratliff, Austin

COMMITTEE MEMBERS

Jeffrey C. Anderson, San Antonio
Roy Lee Barrett, Waco
Richard Bonner, El Paso
Robert V. Garcia, Odessa
Tommy Jacks, Austin
James O'Leary, Odessa
George Parker, San Antonio
William Putnicki, San antonio
Michael Slack, Austin
Tom Spieczny, El Paso
Dale Williams, Waco

MAGISTRATE JUDGE LIASONS

Magistrate Judge Stephen Capelle, Austin
Magistrate Judge Nancy Nowak, San Antonio

BANKRUPTCY LIASON

Chief Bankruptcy Judge Larry Kelly, Waco

REPORTER

Professor William D. Underwood, Waco

I. Introduction.

The Local Rules Advisory Committee (the "Advisory Committee") was appointed by the judges of the United States District Court for the Western District of Texas in December 1998. The Court anticipated amendments to the Federal Rules of Civil Procedure that would mandate changes in the Western District's Local Rules. Proposed amendments were approved by the Judicial Conference on September 14, 1999 and forwarded to the United States Supreme Court for review. If approved by the Supreme Court and not disapproved by Congress, the proposed amendments will take effect on December 1, 2000. The recommendations in this report are based in part on the Advisory Committee's assumption that the proposed amendments to the Federal Rules, as approved by the Judicial Conference, will become effective on December 1, 2000.

The mandate of the Advisory Committee was broader, however, than simply evaluating what changes in the local rules would be necessitated by proposed amendments to the Federal Rules. The Committee was to examine all of the Local Rules to determine whether changes could be made that would improve civil practice in the Western District. The Committee was also to examine the Alternative Dispute Resolution Act of 1998 to determine what changes to the local rules, if any, would be required by that Act.

Pursuant to this mandate, the Committee held an organizational meeting on December 11, 1998. Since that organizational meeting, the Committee has met on a regular basis. Meetings have been held on January 8, 1999, February 5, 1999, March 5, 1999, April 1, 1999, May 7, 1999, June 4, 1999, July 9, 1999, February 11, 2000, and March 10, 2000. The Committee has drawn extensively from the varied experience of the Committee members. The Committee has also solicited input from district judges, magistrate judges, law clerks, and personnel in the Clerk's office. The Committee has likewise solicited input from other lawyers who practice in the Western District. Each of these groups made suggestions that have materially contributed to this report.

In fulfilling its mandate, the Committee has recognized that the Federal Rules Enabling Act mandates that local rules be consistent with the Federal Rules of Civil Procedure and any Acts of Congress. *See* 28 U.S.C. § 2071. Several of the proposed amendments are necessary, in the judgment of the Advisory Committee, to ensure that the Western District's Local Rules are consistent with the Federal Rules. Moreover, Rule 83 of the Federal Rules of Civil Procedure requires that local rules not duplicate the Federal Rules. Several of the current Local Rules merely restate requirements found in the Federal Rules. To comply with Rule 83 and to streamline and simplify the Local Rules, the Advisory Committee's recommendations include proposals to delete those Local Rules that merely duplicate provisions already found in the Federal Rules. Finally, Rule 83 requires that the local rules conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The Committee has endeavored to ensure that the proposed Local Rules of the Western District satisfy these mandates.

The Advisory committee has recognized that court procedures must promote the efficient and expeditious resolution of disputes. Unnecessary expense and delay should be avoided. The Committee believes the proposed amendments to the Local Rules are consistent with this objective. None of the proposals would have the effect of delaying the resolution of disputes in the Western District. And several of the proposals should reduce unnecessary costs that tend to be incurred under certain provisions of the current Local Rules. Court procedures must also be consistent with the principal directive of our civil justice system – that the determination of every action be just. To accomplish this objective, attorneys who know the needs of their clients and the particulars of their clients' disputes must be allowed to litigate free of excessive management. The procedures recommended in the proposed amendments strike an appropriate balance between the need for some management to ensure that cases are resolved as expeditiously and inexpensively as possible and the desire to avoid excessive management.

II. Proposed Amendments to the Local Rules.

The proposed amendments to the Western District's Local Rules follow. Provisions in the current rules that the Advisory Committee recommends be eliminated are indicated by a strikethrough. Provisions that the Advisory Committee recommends be added are indicated by an underscore. The Advisory Committee's rationale for proposed amendments is provided in the Comments that follow each Local Rule for which a revision is proposed.

RULE CV-3. COMMENCEMENT OF ACTION

(a) Civil Cover Sheet. The clerk is authorized and instructed to require a complete and executed AO Form JS 44~~(a)~~, Civil Cover Sheet, which shall accompany each civil case to be filed. The clerk is instructed to accept for filing any civil case which is not accompanied by a complete and executed Civil Cover Sheet and thereafter advise the court of the violation of the rule and seek order of court. Persons filing civil cases, who are at the time of such filing in the custody of Civil, State or Federal institutions, and persons filing civil cases pro se, are exempted from the foregoing requirement.

(b) Habeas Corpus and Motions Pursuant to 28 USC § 2255. Petitions for writ of habeas corpus and motions filed pursuant to 28 U.S.C. § 2255 by persons in custody shall be in writing, signed and verified. Such petitions and motions shall be on forms supplied by the Court and an original and two copies must be filed with the Clerk of the District Court for the Western District of Texas in the proper division.

(c) Petitions to Stay Execution of State Court Judgments.

(1) A plaintiff who seeks a stay of enforcement of a state court judgment or order shall attach to the petition a copy of each state court opinion and judgment involving the matter to be presented. The petition shall also state whether or not the same plaintiff has previously sought relief arising out of the same matter from this court or from any other federal court. The reasons for denying relief given by any court that has considered the matter shall also be attached. If reasons for the ruling were not given in a written opinion, a copy of the relevant portions of the transcripts shall be supplied. If the stay involves a death penalty, the petition shall be filed at least five (5) days before the execution date or the petitioner must establish good cause for any late filing.

(2) If any issue is raised that was not raised, or has not been fully exhausted, in state court, the petition shall state the reasons why such action has not been taken.

(3) This court's opinion in any such action shall separately state each issue raised by the petition and rule expressly on each issue stating the reasons for each ruling made.

(4) If a certificate of probable cause is issued in any such case, the court will also grant a stay of execution to continue until such time as the Court of Appeals expressly acts with reference to it.

(5) If the same petitioner has previously filed in this court an application to stay enforcement of a state court judgment or for habeas corpus relief, the case shall be assigned to the judge who considered the prior matter.

(6) A second or successive petition for habeas corpus may be dismissed if the court finds that it fails to allege new or different grounds for relief, if the failure of the petitioner to assert those grounds in a prior petition constitutes an abuse of the writ, or if the petition is

frivolous and entirely without merit. Even if it cannot be concluded that a petition should be dismissed on these grounds, the court will expedite consideration of any second or successive petition.

Comment

The Committee recommends that the Court make a technical amendment to Local Rule CV-3 to conform the reference in the rule to AO Form JS 44 to the number of the form itself.

RULE CV-5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) All pleadings shall be furnished to the Clerk in duplicate, the "original" of which shall be marked and filed, and the remaining copy shall be sent to the judge on whose docket the case is placed.

~~(b) Depositions (including deposition notices), interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall not be filed unless on order of the Court or when they are in support of a motion or for use in trial and then attached to the appropriate pleadings.~~

~~(c)~~ **(b)** Papers presented for filing shall contain an acknowledgment of service by the person served, or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

~~(d)~~ **(c)** All orders and decrees submitted for settlement or signature must be presented to the clerk's office, and not sent directly to the judge. In case of contest as to form or substance, the clerk will give such notice of hearing thereon as may be required by the judge.

~~(e)~~ **(d)** If documents not conforming to this rule are offered, the Clerk shall file the document and thereafter advise the Court of the violation of the rule and seek order of Court.

Comment

The proposed amendments to the Federal Rules of Civil Procedure would eliminate the need for Local Rule CV-5(b). Proposed Federal Rule 5 provides that:

> disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

The comments to proposed Federal Rule 5 state that the amendment "is designed to supersede and invalidate local rules" addressing the filing of discovery materials. Because amended Federal Rule 5 requires the same procedure currently specified by Local Rule CV-5(b), eliminating the local rule will result in no change in Western District practice.

RULE CV-7. PLEADINGS ALLOWED; FORMS OF MOTIONS

(a) Generally. All motions, unless made during a hearing or trial, shall be in writing. Every motion shall be signed by at least one attorney of record, listing the attorney's mailing address, state bar code number and telephone number (including area code). The signature of an attorney constitutes a certificate of compliance under Rule 11, Federal Rules of Civil Procedure.

Any "pro se" party pleading must bear the "pro se" party's signature and shall specify the "pro se" party's mailing address and telephone number (including area code). The signature of a party "pro se" constitutes a certificate that he or she has read the pleading, that there is a bona fide basis to support the pleading, and the pleading is not made for the purpose of delay.

(b) Documents Supporting Motions. When allegations of fact not appearing in the record are relied upon in support of a motion, a summary of the facts relied upon with supporting affidavits and other pertinent documents then available shall be filed in an appendix, served and filed with the motion.

(c) Legal Authorities Supporting Motions. The specific legal authorities supporting any motion shall be cited in the motion and the motion shall be limited to ten (10) pages in length, unless otherwise authorized by the Court. An appendix may be filed with the motion specifying any factual basis relied upon and shall include all affidavits, deposition transcripts or other documents supporting the relied upon facts. No legal authorities are required to be cited in any of the following motions: (1) for extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed, or as extended by previous orders; (2) to continue a pretrial conference hearing or motion, or the trial of an action; (3) for a more definite statement; (4) to ~~make~~ join additional parties; (5) to amend pleadings; (6) to file supplemental pleadings; (7) to appoint next friend or guardian ad litem; (8) to intervene; (9) for substitution of parties; (10) relating to discovery, including, but not limited to motions for the production and inspection of documents, specific objections to interrogatories, motions to compel answers or further answers to interrogatories, and motions for physical or mental examination; (11) to stay proceedings to enforce judgment; (12) joint motions to dismiss; (13) to withdraw as counsel; (14) for mediation or other form of alternative dispute resolution; ~~(15) to be placed on an expedited docket;~~ and (16~~5~~) for approval of an agreed protective order. All the motions herein referred to, while not required to be accompanied by legal authorities, must state the grounds therefore and cite any applicable rule, statute, or other authority, if any, justifying the relief sought.

(d) Responses. If any party opposes a motion, the respondent shall file a response and supporting documents as are then available within eleven (11) days of service of the motion. ~~during the time period prescribed by Section (f) of this rule.~~ The response shall contain a concise statement of the reasons and opposition to the motion and citations of the specific legal authorities upon which the party relies. The response is limited to ten (10) pages unless otherwise authorized by the Court. If there is no response filed within the time period prescribed by this rule, the Court may grant the motion as unopposed.

(e) Replies. A party may file a reply in support of a motion. Any reply shall be filed within eleven (11) days of service of the response, but the court need not wait for the reply before ruling on the motion. A reply shall be limited to five (5) pages, unless otherwise authorized by the Court.

~~(e)~~ (f) Proposed Orders. A proposed order shall be filed with all motions specifically referenced in Local Rule CV-7(c). When a motion is one that requires a proposed order, any response to that motion shall also be accompanied by a proposed order. ~~Any party may attach to any motion and response a proposed order.~~

~~**(f) Time to File Response.** A party filing a response has eleven (11) calendar days from the date of receipt in which to file and serve the response and supporting documents. The use of short, letter briefs filed with the Clerk in duplicate are encouraged for supplemental responses by the parties.~~

~~**(g) Service.** All parties shall serve copies of their motion papers upon all other parties to the action prior to filing or simultaneously with the filing with the clerk.~~

~~(h)~~ (g) Oral Hearings. A movant or respondent may specifically request an oral hearing, but the allowance of an oral hearing shall be within the sole discretion of the judge to whom the motion is assigned.

~~(i)~~ (h) Conference Required ~~Discovery Motions.~~ The Court may refuse to hear or may deny a nondispositive motion ~~relating to a pretrial discovery~~ unless the movant advises the Court within the body of the motion that counsel for the parties have first conferred in a good-faith attempt to resolve the matter by agreement and, further, certifies the specific reason(s) that no agreement could be made. A dispositive motion within the meaning of this rule is a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment or partial summary judgment, a motion for new trial, and a motion for judgment as a matter of law. Movants are encouraged to indicate in the title of the motion whether the motion is opposed. A motion is unopposed only if there has been an actual conference with opposing counsel and there is no opposition to any of the relief requested in the motion.

~~(j)~~ (i) Claims for Attorney's Fees.

(1) All motions for an award of attorney's fees shall be filed and served no later than fourteen (14) days after entry of judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure. Counsel for the parties shall meet and confer for the purpose of resolving all disputed issues relating to attorney's fees prior to making application. The application shall certify that such a conference has occurred. If no agreement is reached, the applicant shall certify the specific reason(s) why the matter could not be resolved by agreement ~~and so certify in the application~~. The motion shall include a supporting document organized chronologically by activity or project, listing attorney name, date, and hours expended on the particular activity or project, as well as an affidavit certifying (1) that the hours expended were actually expended on the topics stated, and (2) that the hours expended and rate claimed were reasonable. Such application shall also be accompanied by a brief memo setting forth the method by which the amount of fees was computed, with sufficient citation of authority to permit the reviewing court

the opportunity to determine whether such computation is correct. The request shall include reference to the statutory authorization or other authority for the request. Detailed timesheets for each attorney for whom fees are claimed may be required to be submitted upon further order of the Court.

(2) Objections to any motion for attorney's fees shall be filed on or before ~~ten (10) calendar~~ eleven (11) days after the date of filing. If there is no timely objection, the Court may grant the motion as unopposed.

(3) The motion shall be resolved without further hearing, unless an evidentiary hearing is requested, reasons therefor presented, and good cause shown, whereupon hearing on the motion may be granted.

(4) Motions for award of attorney's fees filed beyond the fourteen (14) ~~calendar~~ day period may be deemed untimely and a waiver of entitlement to fees.

Comments

1. The proposed amendment to CV-7(c) reflects the Committee's recommendation that the expedited docket be eliminated. *See* Proposed Rule CV-16 comment 6.

2. The proposed amendment to CV-7(d) would effect no change in Western District practice. It would simply make the local rule regarding the time for response more concise by incorporating current CV-7(f) into proposed CV-7(d). The reference to "calendar" days in the existing rule is unnecessary. Under Federal Rule 6(a), any period in excess of ten days is measured by calendar days.

3. The Committee recommends that Local Rule CV-7 be amended to specifically provide for replies in support of motions. Replies are usually submitted on contested motions and can be quite helpful to the court. Proposed Local Rule CV-7(e), which expressly authorizes replies, would eliminate the need for motions requesting leave to reply. The proposed rule makes clear, however, that the Court need not wait for a reply before ruling on a contested motion. For this reason, the proposed rule authorizing replies should not delay the court's ability to dispose of pending motions.

4. The Committee recommends that parties be required to submit proposed orders on routine motions. This practice would eliminate the need for the Court to prepare such orders. Proposed Local Rule CV-7(f) reflects this recommendation.

5. The current Local Rule CV-7(g) is redundant of Federal Rule 5. For this reason, the Committee recommends that the Local Rule be deleted.

6. The Committee recommends that the conference requirement currently found in Local Rule CV-7(i) be expanded. The proposed Local Rule is found in proposal CV-7(h). Parties are currently

required to confer on discovery motions. Under the proposed amendment, a conference would be required on all nondispositive motions. In addition to certifying that a conference had occurred, the movant would also be required to explain why no agreement was reached. The same conference requirement would also apply to motions for award of attorney's fees under CV-7(i).

RULE CV-16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) A uniform form of scheduling order will be entered in every case except those exempted in Section (b) of this rule and those in which exceptional circumstances require entry of a different form of order. The form of the scheduling order is set out in Appendix "B" of these rules ~~and shall be used unless the Court orders a modification or substitution in an individual case~~. The scheduling order will, after filing, control the course of the case and may not be amended without leave of Court.

(b) The ~~following~~ same types of cases that are exempt from mandatory disclosure requirements under Federal Rule of Civil Procedure 26(a)(1)(E) will be exempt from the scheduling order requirement of Rule 16. In addition, the following categories of cases shall also be exempt from the scheduling order requirement: (1) bankruptcy appeals; (2) civil forfeiture cases; (3) land condemnation cases; (4) naturalization proceedings filed as civil cases; (5) interpleader cases; and (6) any other case where the judge finds that the ends of justice would not be served by using the scheduling order procedure of Rule 16.

~~**(1)** Social Security cases filed under 42 U.S.C. § 405 (g);~~

~~**(2)** Applications for writs of habeas corpus under 28 U.S.C. § 2254;~~

~~**(3)** Motions to vacate sentence under 28 U.S.C. § 2255;~~

~~**(4)** Civil forfeiture cases;~~

~~**(5)** IRS summons cases;~~

~~**(6)** Bankruptcy matters;~~

~~**(7)** Land condemnation cases;~~

~~**(8)** Naturalization proceedings filed as civil cases;~~

~~**(9)** Interpleader cases;~~

~~**(10)** Cases under 42 U.S.C. § 1983 filed by prisoners proceeding pro se;~~

~~**(11)** VA overpayment cases;~~

~~**(12)** Student loan cases;~~

~~**(13)** Out-of-district subpoena cases;~~

~~**(14)** Cases assigned to the expedited docket; and~~

~~**(15)** Any other cases where the judge finds that the ends of justice would not be served by using the scheduling order procedure of Rule 16.~~

~~**(c)** The District Judges of the United States District Court for the Western District of Texas voted unanimously to "opt out" of the mandatory disclosure and presumptive discovery limits as set out in Rules 26, 30, 31, and 33 of the Federal Rules of Civil Procedure which became effective on December 1, 1993. In lieu of these federal procedural rules, the Western District of Texas will utilize the rules adopted by the District pursuant to the Civil Justice Reform Act of 1990. More specifically, Local Rules CV-16, CV-26, CV-30, CV-33, CV-36, and not Rules 26, 30, 31 and 33 of the Federal Rules of Civil Procedure shall apply (regarding mandatory disclosure and presumptive discovery limits) to all civil proceedings unless otherwise ordered by the Court.~~

Within ~~thirty (30)~~ sixty (60) days after any appearance of any defendant, the ~~plaintiff~~ parties shall submit a proposed scheduling order to the Court in the form as indicated in Appendix "B". The ~~Plaintiff~~ parties first shall confer ~~with any party who has appeared in the action concerning~~ as required by Rule 26(f). The content of the proposed scheduling order ~~which~~ shall include proposals for all deadlines set out in the form for scheduling order contained in Appendix "B" to these rules. The parties shall endeavor to agree concerning the contents of the proposed order, but in the event they are unable to do so, each party's position and the reasons for the disagreement shall be included in the proposed schedule submitted to the Court. In the event the plaintiff has not yet obtained service on all defendants, the plaintiff shall include an explanation of why all parties have not been served. The scheduling proposals of the parties shall be considered by the trial court, but the setting of all dates is within the discretion of the Court.

~~**(d)** Unless otherwise ordered by the Court, the scheduling order in each civil case will require the completion of discovery within six months of the filing of the defendant's initial pleadings.~~

~~**(e)** Unless otherwise ordered by the Court, the plaintiff shall, within forty (40) days after the filing of the first defendant's appearance, file a pleading listing the identity of all potential witnesses and, in the case of expert witnesses, a written summary of the expert's proposed testimony,* and a list of the proposed trial exhibits and, within thirty (30) days after the plaintiff's disclosure, the defendant shall file a pleading listing the identity of all potential witnesses and, in the case of expert witnesses, a written summary of the expert's proposed testimony,* and a list of the proposed trial exhibits. Supplementation, regarding substance and/or timeliness, may be permitted by the Court upon the showing of good cause. The provisions of this paragraph may be altered by the parties with the approval of a scheduling order wherein the dates of the disclosures are specifically established.~~

~~* The written summary of any expert witness shall include all opinions and the basis of the opinions which purport to be the testimony of the witness, specific reference to any exhibits that will be used by the witness in support of any opinions, a summary of the witness's qualifications, and the method of compensation to be paid to the witness.~~

~~**(f)** Expedited Docket. Upon the written consent of all parties filed before thirty (30) days after the first defendant's initial appearance, the Court shall order the case placed on the expedited docket. Any case on this docket will be exempted from the requirements of ADR, scheduling orders, and pretrial orders. To be eligible for the Expedited Docket, the parties must stipulate to trial by a Magistrate Judge (whether jury or nonjury trial). A specific trial setting will be made within six months of the order placing the case on the Expedited Docket. No consent for placement on the Expedited Docket, once given, may be withdrawn except upon showing of good cause as determined by the Court. The form of this consent is as set out in **Appendix B-4**.~~

~~**(g)** Unless otherwise ordered by the Court, in any pretrial conference scheduled by the Court, each party is to be represented by an attorney or person with authority to bind the party to all matters discussed or, alternatively, some person with such authority must be available at the time of the conference by telephone.~~

(d) Unopposed discovery may continue after the deadline for discovery contained in the scheduling order, provided that discovery does not delay other pretrial preparations or the trial setting. No motions relating to discovery, including motions under Rules 26(c), 29, and 37, shall be filed after the expiration of the discovery deadline, unless they are filed within five(5) business days after the discovery deadline and pertain to conduct occurring during the final seven(7) calendar days of discovery. Written discovery is not timely unless the response to that discovery would be due before the discovery deadline. The responding party has no obligation to respond and object to written discovery if the response and objection would not be due until after the discovery deadline. Depositions must be completed before the discovery deadline. Notices served before the discovery deadline which purport to schedule depositions after the discovery deadline will not be enforced.

(e) Unless otherwise ordered by the Court, each party must serve and file the following information at least ten (10) calendar days before the scheduled date for trial, the date of jury selection, docket call, or the final pretrial conference, whichever is first.

(1) A list of questions the party desires the Court to ask prospective jurors.

(2) In cases to be tried to a jury, a statement of the party's claims or defenses to be used by the Court in conducting voir dire. The statement shall be no longer than ½page with type double-spaced.

(3) A list of proposed stipulated facts.

(4) An appropriate identification of each exhibit as specified in this rule (except those to be used for impeachment only), separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(5) The name and, if not previously provided, the address and telephone number of each witness (except those to be used for impeachment only), separately identifying those whom the party expects to present and those whom the party may call if the need arises.

(6) The name of those witnesses whose testimony is expected to be presented by means of a deposition (except those to be used for impeachment only) and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.

(7) Proposed jury instructions and verdict forms.
(8) Any motions in limine.
(9) An estimate of the probable length of trial.

At least three (3) calendar days prior to the scheduled date for trial, the date of jury selection, docket call, or the final pretrial conference, whichever is first, each party must serve and file the following:

(1) A list disclosing any objections to the use under Rule 32(a) of a deposition designated by the other party.
(2) A list disclosing any objection, together with the grounds therefore, that may be made to the admissibility of any exhibits. Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the Court for good cause shown.

(f) All trial exhibits shall be marked with an identifying sequence, followed by a dash, followed by a number; for example, Exhibit P-1 and Exhibit D-1. The identifying sequence (e.g., "P" and "D") will identify the party who will offer the exhibit. Parties will assign numbers to their exhibits consecutively, beginning with the number 1. The letter "G" will be assigned to the government for identification purposes. In cases involving more complex pleading relationships (e.g., consolidated cases, intervenors, and third-party actions), it will be the responsibility of counsel for the plaintiff(s) -- in consultation with the judge's courtroom deputy clerk -- to coordinate the assignment of the unique identification sequences.

Comments

1. The Committee recommends that the Court adopt a uniform form of scheduling order. The Committee recognizes that the deadlines provided in scheduling orders will and should vary among cases depending on considerations such as the nature of the case, the recommendations of the parties, and local docket conditions. Nonetheless, the Committee believes there is no compelling justification for the wide disparity in form of scheduling orders currently used within the Western District. This variation needlessly complicates practice within the district for all except those lawyers who confine their practice to a single judge.

2. Proposed Rule 26(a)(1)(E) exempts certain categories of cases from mandatory disclosure obligations. The reasons for exempting cases from mandatory disclosure are largely the same as the reasons for exempting cases from scheduling requirements. The cases are generally not complex, will not involve discovery, and usually will be determined by default or dispositive motion. To avoid potentially confusing duplication, the Committee Proposal recommends that CV-16(b) simply incorporate by reference the categories of cases listed in proposed Federal Rule 26(a)(1)(E). The Committee further recommends that CV-16(b) identify several addition categories of cases that should be exempt from scheduling requirements, even though they are not also exempt from mandatory disclosure obligations. These categories of cases have traditionally been exempt from scheduling order requirements in the Western District and include bankruptcy appeals, land condemnation cases, naturalization proceedings filed as civil cases, and interpleader cases.

3. Proposed Federal Rule 26(a) no longer authorizes local districts to "opt out" of the mandatory disclosure procedure provided in that rule. Moreover, proposed Federal Rule 26(b)(2) no longer authorizes local districts to "opt out" of presumptive limits on depositions and interrogatories as provided in Federal Rules 30, 31 and 33. The Committee has concluded that Local Rule CV-16(c) must be repealed to conform to the requirements of these revised Federal Rules. For the same reason, the Committee has concluded that Local Rule CV-16(e), which substituted a limited local disclosure obligation for the obligation provided in Rule 26(a), is inconsistent with the revised Federal Rules and must also be repealed.

4. Proposed Rule 26(f) requires parties to confer and submit a proposed discovery plan. The proposed rule requires that this conference occur at least 21 days before the parties are required to submit a proposed scheduling order. Although districts would no longer be permitted to opt out of the Rule 26(f) conference requirement by local rule, districts could adopt a local rule altering the timing of that conference. Thus, the Court could adopt a local rule providing that the Rule 26(f) conference may occur anytime prior to the deadline for submitting a proposed scheduling order. Once the conference occurs, the parties must exchange the disclosures required by Federal Rule 26(a). These disclosures must be made within 14 days of the Rule 26(f) conference. Although the Court may change the timing for disclosures by orders entered in particular cases, proposed Rule 26(a)(1) does not authorize the Court to adopt a local rule that generally provides a different time for disclosures to be exchanged in all cases.

Current Local Rule CV-16(c) requires the plaintiff to submit a proposed scheduling order to the Court within 30 days after the appearance of any defendant. The plaintiff's disclosures are due within 40 days of the first defendant's appearance, and the defendant's disclosures are due 30 days later. With the changes in proposed Federal Rule 26, the current Local Rule (CV-16(c)) would require the parties to conduct a Rule 26(f) conference within nine days of the first defendant's appearance. The Rule 26(a) mandatory disclosures would be due for both sides within 23 days of that first defendant's appearance.

The Advisory Committee was unanimously of the view that these time requirements are not practical. Scheduling conflicts would often prevent the attorneys from scheduling a meaningful conference within nine days of the first defendant's appearance. In multiple party cases, this problem of scheduling conflicts would often be insurmountable. Indeed, in cases with multiple defendants who are served at different times (and thus have different appearance dates), an early Rule 26(f) conference would often be an empty formality. The plaintiff and the first defendant to appear would participate in the conference, but any decisions made regarding scheduling and the conduct of discovery would have to be revisited once later served defendants appear. Moreover, requiring the parties to make mandatory disclosures within 23 days of the first defendant's appearance would not be realistic (current Western District practice allows the plaintiff 40 days and the defendant 70 days from the first defendant's appearance to make disclosures).

To address these problems, the Committee recommends that the Court amend Local Rule CV-16(c) to provide the parties with a longer period to submit their proposed scheduling order. This would

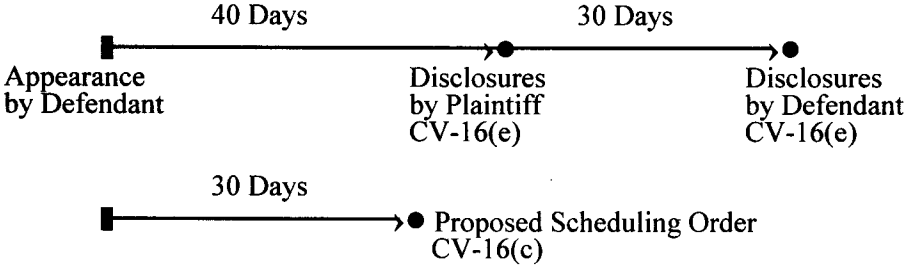
have the effect of permitting the parties a more realistic time frame for scheduling and conducting the mandatory Rule 26(f) conference. It would also have the effect of extending the time for the parties to compile the information needed to make the disclosures required under Rule 26(a)(1). Under the proposed amendment, Local Rule CV-16(c) would provide the parties with 60 days (rather than 30 days) to submit a proposed scheduling order. Rule 16(b) of the Federal Rules of Civil Procedure requires only that the proposed scheduling order be due in time to allow the Court to enter a scheduling order "within 90 days after the appearance of any defendant and within 120 days after the complaint has been served on a defendant." The proposed amendment would thus leave the Court with ample time to consider the schedule proposed by the parties and enter an order in compliance with Federal Rule 16(b).

This proposal would have the beneficial effect of extending the time for scheduling and completing the Rule 26(f) conference from 9 to 39 days after the appearance of any defendant. The proposal would also have the effect of extending the time for exchanging initial disclosures from 23 to 53 days after the first defendant's appearance. Under current Local Rule CV-16(e), the plaintiff's disclosures are due within 40 days after the first defendant's appearance, with the defendant's disclosures due 30 days later. Thus, under the proposed amendment to Local Rule CV-16(c) the parties would have completed their exchange of initial disclosures earlier (53 days) than under current Western District practice (70 days).

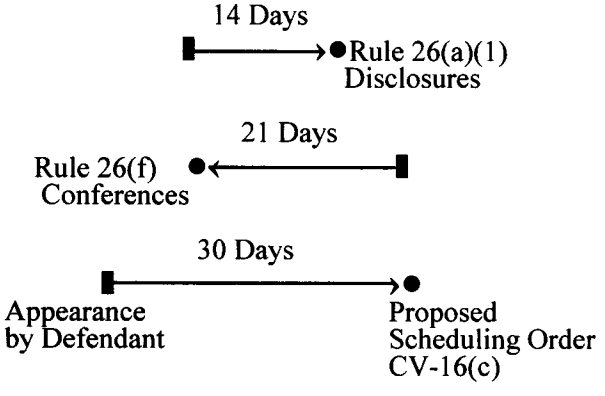
Entry of a scheduling order would be delayed under the proposed amendment. Nonetheless, the Court could mitigate the effect on the Court's docket of this delay by making appropriate adjustments in the periods of time provided in the scheduling order. For example, a particular judge may have usually provided the parties six months to complete discovery following entry of the scheduling order. The judge might instead provide the parties with only five months under the amended Local Rule. This change would simply acknowledge that the parties had an additional month to initiate discovery before the Court entered a scheduling order.

The following chart may help illustrate the impact of the proposed amendment to CV-16(c) on the Court's ability to process cases promptly. The first illustration reflects that under current Western District practice, the parties have 30 days from the first defendant's appearance to submit a proposed scheduling order and 70 days to complete their initial disclosures. The second illustration demonstrates how quickly the parties would have to act to comply with the time requirements of current Local Rule CV-16(c) if those requirements are not amended following adoption of the amendments to proposed Federal Rule 26. The parties would have only 9 days from the first defendant's appearance to confer and only 23 days to exchange disclosures. The third illustration demonstrates how the proposed amendments to the Local Rules and Federal Rules would operate.

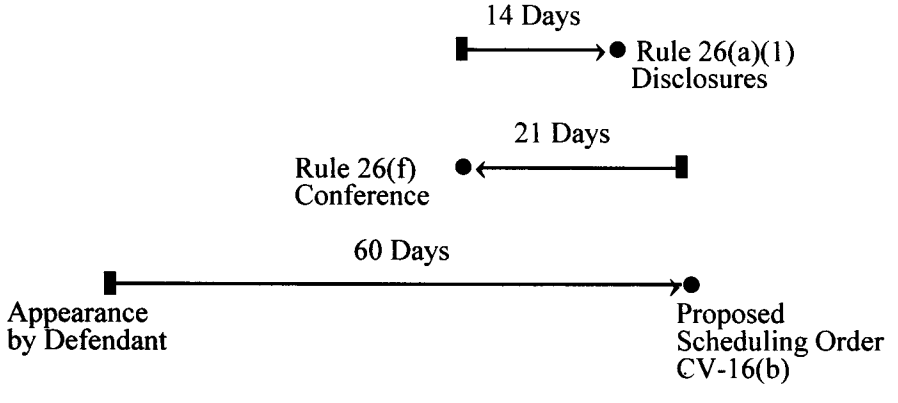
Current CV-16(c)



Proposed Amendment to Federal Rules Without Amendment to CV-16(c)



Proposed Amendment to CV-16(c)



---

5. The Committee believes that Local Rule CV-16(d) is unnecessary. The rule provides that the Court will provide a six-month period for completing discovery, but only unless the Court determines to provide some other period. Thus, whatever period the Court specifies in the scheduling order is controlling, regardless of Local Rule CV-16(d).

6. Created as part of the Civil Justice Reform Act process, the expedited docket has been largely ignored by attorneys practicing in the Western District. Moreover, the expedited docket may have actually discouraged parties from consenting to trial before magistrate-judges by creating a mistaken perception with some lawyers that consent to trial before a magistrate-judge equates to consent to placement of a case on the expedited docket. For these reasons, the Committee recommends that the Court discontinue the experiment with the expedited docket and repeal Local Rule CV-16(f).

7. Current Local Rule CV-16(g) is entirely redundant of the last paragraph of Rule 16 of the Federal Rules of Civil Procedure, which provides that "at lease one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." Because of this redundancy, the Committee recommends that Local Rule CV-16(g) be repealed as unnecessary.

8. Preparation of the proposed pretrial order is a source of much unnecessary expense under current practice in the Western District and elsewhere. The proposed pretrial orders are often due before the information is needed by the Court and before pending dispositive motions are decided. Moreover, much of the information included in the proposed order is of little benefit to the Court or the parties. The Committee recommends that the current practice of submitting joint proposed pretrial orders be eliminated. Instead, each party would prepare pretrial submissions under proposed Local Rule CV-16(e). The submissions would not be required until shortly before trial. Only information of real benefit to the Court would be required in the pretrial submissions.

RULE CV-26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) If relief is sought under Rule 26(c), Fed.R.Civ.P., concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be attached to the motion ~~filed under Rule 26(c) Fed.R.Civ.P~~.

~~**(b) Exhibits**~~

~~**(1)** All exhibits shall be marked with an identifying sequence, followed by a dash, followed by a number; for example, Exhibit P-1 and Exhibit D-1. The identifying sequence (e.g., "P" and I'D") will identify the party whose exhibit it is. The identifying sequences will be assigned to the parties in accordance with paragraph (b). Parties will assign numbers to their exhibits consecutively, beginning with the number 1.~~

~~**(2)** The identifying sequence will be assigned to each party or set of parties with a sufficient identity of interest that they are either all represented by the same attorneys, or at least one attorney represents all parties which comprise the set.~~

~~**a.** The letter "G" will be assigned to the government for identification purposes.~~

~~**b.** If there is only one plaintiff or if all the plaintiffs are to have common exhibits, the letter "P" will be assigned to the plaintiff(s) for identification purposes. Likewise, if there is only one defendant or if all the defendants are to have common exhibits, the letter I'D" will be assigned to the defendant(s) for identification purposes.~~

~~**c.** In a case involving multiple parties who do not have common exhibits, the first set of parties having common exhibits named in the caption of the case will be identified as "P1" ("D1") the second set of parties sharing common exhibits as lIP211 ("D2") etc.~~

~~**d.** In cases involving more complex pleading relationships (e.g., consolidated cases, intervenors, and third-party actions), it will be the responsibility of counsel for the plaintiff(s) -- in consultation with the judge's courtroom deputy clerk -- to coordinate the assignment of the unique identification sequences.~~

~~**e.** Counsel shall obtain and prepare exhibit tags and mark each exhibit with the exhibit number. If not otherwise available, counsel may obtain exhibit tags from the clerk.~~

~~**f.** If the identifying sequence system either has not been used during discovery, or if some exhibits that were identified during depositions need not be offered at trial, deposition exhibits that are to be offered may be renumbered to conform with this rule so long as adequate steps are taken to avoid confusion to the other parties, the court and the record. For example, the parties may agree to simply renumber deposition exhibits and references to such exhibits in depositions. Another example: exhibits referred to in deposition summaries may be renumbered so long as the summary contains a table correlating the deposition exhibit numbers with the trial exhibit numbers.~~

~~**g.** Counsel shall mark all exhibits before trial in accordance with this rule. A list of exhibits intended to be offered at trial (except those offered solely for impeachment or rebuttal) shall be filed with the clerk's office prior to jury selection.~~

~~**(c)**~~ **(b)** The full text of the definitions and rules of construction set forth in this paragraph is deemed incorporated by reference into all discovery requests, but shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations or (iii) a more narrow definition of a term defined in this paragraph. This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure. The following definitions apply to all discovery requests:

(1) Communication. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) Document. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft of a non-identical copy is a separate document within the meaning of this term.

(3) Identify (With Respect to Persons). When referring to a person, to "identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) Identify (With Respect to Documents). When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s).

(5) Parties. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where

applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) Person. The term "person" is defined as any natural person or business, legal or governmental entity or association.

(7) Concerning. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

~~**(d)**~~ **(c)** ~~**Protective Orders.**~~ Upon motion by any party, the Court shall enter a protective order in the form set out in Appendix H, absent a showing of good cause by any party opposing entry of the order. In cases where the parties agree to a protective order, the form set out in Appendix H is approved.

~~**(e)** A party claiming a privilege with respect to a particular document or information must comply with the following:~~

~~**(1)** The claimant must state the particular rule of privilege upon which the claim is based. This may be done by the use of an identification code if such a code is set out.~~

~~**(2)** There must be appended to the claim any information, in addition to that in the document itself, necessary to establish the factual elements required by the privilege rule invoked. The information must be sufficiently detailed to permit decision on the claim and must be verified by affidavit by a person or persons having knowledge of the facts asserted.~~

~~**(3)** In connection with a government privilege, in addition to the substantiating material required by subparagraphs (1) and (2) herein, a statement shall be provided from the appropriate official in the department on behalf of which the privilege is claimed, stating that the official has examined the documents or has been given a detailed review of them, and personally approves the assertion of the privilege.~~

~~When a privilege is a qualified one, once the asserting party satisfies the burden of demonstrating that the material falls within the privilege, the burden is then on the party opposing the privilege to establish reasons why the materials should be disclosed. For the work product privilege, this burden entails satisfying the standards in Rule 26(b)(3) of the Federal Rules of Civil Procedure.~~

~~For qualified government privileges other than the presidential privilege, this burden entails showing that the relevant interests justifying disclosure outweigh the relevant interests justifying nondisclosure.~~

~~When a document contains both privileged and unprivileged material, the unprivileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed.~~

(d) A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless – within ten (10) days or a longer or shorter period ordered by the court, or specified by Local Rule CV-16(e), after the producing party has actual notice that the document will be used – the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

Comments

1. The Advisory Committee recommends that the Court rescind the local rule requiring deposition exhibits to be numbered sequentially during the discovery process. Lawyers have had great difficulty complying with the rule, which provides little benefit at trial. The exhibit numbering system deleted from Local Rule CV-26 would instead be incorporated into Local Rule CV-16 and would apply only to trial exhibits.

2. The form protective order provided in Appendix H and referred to in Local Rule CV-26 has proven to be quite beneficial. The Advisory Committee recommends only a minor revision to the form to eliminate an unintended distinction between corporate and non-corporate parties.

3. The Advisory Committee recommends that the Court rescind the local rule specifying the procedure for preserving and presenting claims of privilege. The local rule simply restates the procedure clearly established by case law and thus serves no good function.

4. The Advisory Committee recommends that the Court adopt a rule providing for self-authentication of documents. Such a rule would have the beneficial effect of eliminating the need to conduct unnecessary discovery into the authenticity of documents produced by opposing parties, when the authenticity of those documents is not genuinely at issue. Proposed Rule CV-26(d) is based on Rule 193.7 of the Texas Rules of Civil Procedure.

RULE CV-30. DEPOSITIONS UPON ORAL EXAMINATION

~~**(a)** The originals of all stenographically reported depositions shall be delivered to the party taking the depositions.~~

~~**(1)** Upon signature by the deponent, or~~

~~**(2)** Upon completion if signature is waived on the record by the deponent and all interested parties, or~~

~~**(3)** Upon certification by the shorthand reporter that following reasonable notice to the deponent's attorney (if any) of the availability of the transcript for signature, the deponent has failed or refused to sign it.~~

~~**(b)** The original of a deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or a trial of the case.~~

~~**(c)**~~ **(a) Notice.** The notice for a deposition shall be in the form prescribed in Rule 30, Fed. R. Civ. P., and in addition shall state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

~~**(d)**~~ **(b) Procedures, examinations and objections.** ~~Rule 30, Fed. R. Civ. P., governs the procedural rules, examination of the witness, objections, recesses and termination of any deposition; however~~, The parties are permitted to stipulate on the record of the deposition any agreement regarding the rules for the deposition~~, including agreement to reserve all objections until a specified time, reserve specific objections only, and waiving signature of the witness.~~ Objections during depositions shall be stated concisely and in a non-argumentative and non-suggestive manner. An attorney shall not, in the presence of the deponent, make objections or statements which might suggest an answer to the deponent. An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question, except for the purpose of determining whether a claim of privilege should be asserted. An attorney who instructs a deponent not to answer a question shall state, on the record, the legal basis for the instruction consistent with Federal Rule of Civil Procedure 30(d)(1). If a claim of privilege has been asserted as a basis for an instruction not to answer, the attorney seeking discovery shall have reasonable latitude during the deposition to question the deponent and establish relevant information concerning the appropriateness of the assertion of the privilege, including (i) the applicability of the privilege being asserted, (ii) the circumstances that may result in the privilege having been waived, and (iii) circumstances that may overcome a claim of qualified privilege. A violation of the provisions of this local rule may be deemed to be a violation of a court order and may subject the violator to sanctions under Federal Rule of Civil Procedure 37(b)(2).

~~**(e) Exhibits.** All exhibits identified during depositions should be numbered sequentially regardless of the deposition in which they are used.~~

~~(f)~~ **(c) Attendance by telephone.** Counsel for any party ~~other than the party noticing the deposition~~ may elect to attend the deposition by telephone at that counsel's expense.

~~(g)~~ **(d) Videotaped and audiotaped depositions.** If the deposition is to be recorded by videotape or audiotape, the party noticing the deposition or subpoenaing the witness shall be responsible for ensuring that the equipment used is adequate to produce a clear record. If the deposition is to be recorded by videotape, the procedures set out in Appendix I shall govern the deposition proceedings, except upon stipulation of the parties or order of the Court upon motion and showing of good cause.

Comments

1. The Committee recommends that CV-30(a) be deleted. The local rule is inconsistent with Federal Rule 30(e) with regard to signature of depositions.

2. The Committee recommends that those provisions in CV-30(b) and (d) that simply restate provisions found in Federal Rules be deleted. The Committee further recommends that the provision for deposition procedures be amended to regulate the practice of coaching witnesses during depositions.

3. The provision regarding sequential numbering of exhibits during discovery found in CV-30(e) has proven unworkable in practice. The Committee recommends that this provision be deleted.

~~**RULE CV-32. USE OF DEPOSITIONS IN COURT PROCEEDINGS**~~

~~All portions of depositions to be offered at trial shall be designed prior to jury selection and opposing counsel notified.~~

Comment

The Committee recommends that Local Rule CV-32 be deleted. The burden of complying with this rule outweighs any benefit provided by requiring the designations. In fact, parties tend to designate so liberally that the designations provide no real benefit.

RULE CV-33. INTERROGATORIES TO PARTIES

~~**(a)** Each party that chooses to submit written interrogatories pursuant to Rule 33, Fed.R.Civ.P, will be initially limited to propounding twenty questions to each adverse party. Each separate paragraph within a question and each sub part contained within a question which calls for a response shall be counted as a separate question. The Court may permit further interrogatories upon a showing of good cause.~~

~~**(b)** If interrogatories or answers are to be used at trial, the portions to be used shall be filed with the Clerk at the outset of the trial insofar as their use reasonably can be anticipated.~~

(a) All answers to interrogatories must be signed by the party except that, if circumstances prevent a party from signing responses to interrogatories, the attorney may serve the responses without the party's signature if an affidavit is served simultaneously stating that properly executed responses to interrogatories will be filed within twenty (20) days. Such time may be extended by order of the Court.

~~**(c)**~~ **(b)** Each party that chooses to submit written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure may use the following ~~instructions and~~ questions. The Court will not entertain any objection to these approved interrogatories, except upon a showing of exceptional circumstances. Each of the following interrogatories counts as one question; as to all interrogatories other than those approved in this rule, subparts count as separate questions.

~~**(1) Instructions.**~~

~~**a.** All interrogatories must be answered fully in writing in accordance with Rules 33 and 11 of the Federal Rules of Civil Procedure.~~

~~**b.** All answers to interrogatories must be signed by the party except that, if circumstances prevent a party from signing responses to interrogatories, the attorney may file the interrogatories without the party's signature if an affidavit is filed simultaneously stating that properly executed responses to interrogatories will be filed within twenty (20) days. Such time may be extended by order of the Court.~~

~~**c.** In the event any question cannot be fully answered after the exercise of reasonable diligence, the party shall furnish as complete an answer as he can and explain in detail the reasons why he cannot give a full answer, and state what is needed to be done in order to be in a position to answer fully and estimate when he will be in that position.~~

~~In the event a party opponent fails to answer an interrogatory fully and offers an explanation therefor, the opposing party shall respond to said explanation within ten (10) days after its receipt if he disagrees with the same.~~

~~**d.** If there is more than one plaintiff or more than one defendant in a case, each interrogatory must be answered separately for each unless the answer is the same for all.~~

~~**e.** Each interrogatory shall be set forth immediately prior to the answer thereto.~~

~~**(2) Interrogatories.**~~

(1) ~~**a.**~~ Identify all persons who you believe have knowledge of relevant facts and ~~describe~~ identify the issues upon which you believe they have knowledge.

~~**b.** Identify each person whom you expect to call as an expert witness at the trial of this case, and, as to each expert so identified, state the subject matter on which he is expected to testify, the substance of the facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion.~~

(2) ~~**c.**~~ Identify all persons or legal entities who have a subrogation interest in the cause of action set forth in your complaint [or counterclaim], and state the basis and extent of said interest.

(3) ~~**d.**~~ If [name of party to whom the interrogatory is directed] is a partner, a partnership, or a subsidiary or affiliate of a publicly owned corporation that has a financial interest in the outcome of this lawsuit, list the identity of the parent corporation, affiliate, partner, or partnership and the relationship between it and [the named party]. If there is a publicly owned corporation or a holding company not a party to the case that has a financial interest in the outcome, list the identity of such corporation and the nature of the financial interest.

(4) ~~**e.**~~ If the defendant is improperly identified, give its proper identification and state whether you will accept service of an amended summons and complaint reflecting the information furnished by you in answer hereto.

(5) ~~**f.**~~ If you contend that some other person or legal entity is, in whole or in part, liable to [the plaintiff or defendant] in this matter, identify that person or legal entity and describe in detail the basis of said liability.

~~**g.** Set forth the names and addresses of all insurance companies that have liability insurance coverage relating to the matter alleged in the complaint [or counterclaim], the number or numbers of said policies, the amount of liability coverage provided in each policy, and the named insured in each policy.~~

~~**h.** If you contend that you have been injured or damaged, describe the injuries and damages.~~

~~**i.** If you are seeking an award of any sum of money, whether by damages or otherwise, state the full amount of money you seek and describe the manner in which the amount was calculated. Your description should include each element of damage or component of recovery that you seek, the amount sought for each element or component, the manner in which each element or component of the calculation was determined, and should identify the source of each number used in the calculation.~~

Comments

1. Federal Rule 26(b)(2) no longer authorizes local districts to "opt out" of the presumptive limit of one set of twenty-five interrogatories as provided in Federal Rule 33. Since Local Rule CV-33(a), which provided for one set of twenty interrogatories, is now inconsistent with the requirements of the Federal Rules, the Committee recommends that it be repealed.

2. The Committee was unable to identify any purpose served by Local Rule CV-33(b), which requires interrogatory answers to be filed with the Clerk if they are to be used at trial. For this reason, the Committee recommends that this Local Rule be repealed.

3. Provisions that simply recite the requirements of the Federal Rules of Civil Procedure have been eliminated as redundant. Likewise, unnecessary form instructions have been eliminated. And form interrogatories rendered obsolete by the new disclosure requirements applicable in the Western District under Rule 26 of the Federal Rules have been eliminated.

RULE CV-36. REQUESTS FOR ADMISSION

~~**(a)**~~ Requests for admissions made pursuant to Rule 36, Fed.R.Civ.P, will be limited to thirty(30) requests, which shall in like manner include all separate paragraphs and sub-parts contained within a number request. The Court may permit further requests upon a showing of good cause.

~~**(b)** If requests or responses are to be used at trial, the portions to be used shall be filed with the Clerk at the outset of the trial insofar as their use reasonably can be anticipated.~~

Comments

1. The Committee was unable to identify any purpose served by Local Rule CV-36(b), which requires admissions to be filed with the Clerk if they are to be used at trial. For this reason, the Committee recommends that Local Rule CV-36(b) be deleted.

~~RULE CV-37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS~~

~~**(a)** If relief is sought under Rule 37, Fed.R.Civ.P., concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with the motion filed under Rule 37, Fed.R.Civ.P.~~

~~**(b)** Unless otherwise ordered, the Court will not entertain any motion under Rule 37, Fed.R.Civ.P., unless counsel for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion and states, within the motion itself, the reason or reasons no agreement could be reached. Counsel for the moving party shall file a certificate of compliance with this rule in any motion filed under Rule 37, F.R.C.P.~~

Comment

These provisions merely restate the requirements found in Rules 32 and 37. The Committee recommends that they be eliminated as unnecessary.

RULE CV-65. INJUNCTIONS

An application for a temporary restraining order or for a preliminary injunction shall be made in an instrument separate from the complaint.

Comment

Plaintiffs frequently request interlocutory injunctive relief in their Complaint but do not actively pursue such relief. The proposed new rule would assist the Court and parties to identify those circumstances in which interlocutory relief is being actively pursued. A party actively seeking such relief would be required to file an application or motion separate from the Complaint. The language in the proposed rule is borrowed from the Local Rule CV-65 of the Eastern District of Texas.

RULE CV-87. ARBITRATION

(a) SCOPE AND EFFECTIVENESS OF RULE.

This Rule governs the mandatory referral of certain actions to non-binding arbitration and the voluntary arbitration of actions, as provided by 28 U.S.C. § 651 et seq. It shall apply to actions which are within the scope of this rule filed after the effective date of this rule. Its purpose is to provide an incentive for the speedy, fair, and economical resolution of controversies by informal procedures while preserving, with respect to matters referred to compulsory arbitration, the right to a conventional trial.

(b) CERTIFICATION OF ARBITRATORS.

(1) Certification. Arbitrators shall be selected by the Court from applications submitted by or on behalf of attorneys willing to serve.

(2) Eligibility. An individual may be certified to serve as an arbitrator if:

a. the person has been a member of the Bar of the highest court of any State or the District of Columbia for at least five years; and

b. the person is either a member of the Bar of the United States District Court for the Western District of Texas or a member of the faculty of an accredited law school within Texas; and

c. the person is determined by the Court to be competent to perform the duties of an arbitrator.

(3) Oath or Affirmation. Each arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator.

(4) Maintenance of List. A list of all persons certified as arbitrators shall be maintained in the office of the clerk.

(5) Supplementing List. The list may be supplemented from applications submitted to the Court by or on behalf of attorneys willing to serve and eligible under Section (b)(2).

(6) Selection by Agreement. The parties may by mutual written agreement designate arbitrators who are neither lawyers nor certified under this Rule.

(c) JURISDICTION.

(1) Cases Subject to Compulsory Referral. Except as otherwise provided herein, all cases filed in or transferred to the San Antonio Division of the Western District of Texas, and by order of any court regarding its own docket in any other division, the Clerk shall refer to arbitration civil actions in which:

a. The United States is a party, and:

(i) the action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

(ii) the action is of a type that the Attorney General, by subject matter be settled, has delegated authority for settlement or decision to the of f ice of the United States Attorney for the Western District of Texas; or

(iii) the action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. § 270 (b) , the Miller Act), the United States has no monetary interest in the claim, and the relief sought consists only of money damages not in excess of $150,000, exclusive of interest, costs and attorneys' fees; or

b. The United States is not a party, and:

(i) the relief sought consists only of money damages not in excess of $150,000 exclusive of interest, costs, and attorneys fees; and

(ii) jurisdiction is based in whole or in part on Title 28 U.S.C. §§ 1331, 1332 or 1333.

(2) Cases Subject to Discretionary Referral. The Bankruptcy Court may refer to arbitration any adversary proceeding in bankruptcy which would otherwise be subject to compulsory arbitration under paragraph (1) above.

(3) Cases Subject to Referral With Consent of Parties. Parties may consent to arbitration in any pending civil matter, at any time. In addition, parties may consent to arbitration in any case subject to compulsory arbitration in which there is pending any

motion to dismiss, motion for judgment on the pleadings, motion to Join necessary parties or motion for summary judgment.*

(4) Determination of Monetary Claim. For purposes of this Rule only, in all civil cases in which a specific dollar amount is not included in the prayer for relief, damages shall be presumed to be not in excess of $150,000, exclusive of interest, costs, and attorneys' fees, unless:

a. Counsel for plaintiff, at the time of filing the Complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this Court, within twenty (20) days of the docketing of the case in this district, files a separate certification with the Court that the damages sought exceed $150,000, exclusive of interest, costs and attorneys' fees; or

b. Counsel for a defendant, at the time of filing a counter-claim or cross-claim, files a separate certification with the Court that the damages sought by the counter-claim or cross-claim exceed $150,000, exclusive of interest, costs, and attorneys, fees.

(5) Safeguards in Consent Cases. No party or attorney shall be prejudiced for refusing to consent to arbitration pursuant to Section (C)(3) hereof. In any action in which arbitration by consent is held pursuant to said Section, the Court may sua sponte, and shall upon motion of any party, determine whether the consent to arbitration was freely and knowingly obtained.

*** ADVISORY NOTE:** Examples of types of cases where the parties may consent to arbitration include:

a. when an action is based on an alleged violation of a right secured by the Constitution of the United States;

b. if jurisdiction is based in whole or in part on 28 U.S.C. § 1343 or Title VII;

c. if the relief requested exceeds $150,000 and/or includes non-monetary claims; or

d. any adversary proceeding in bankruptcy.

(d) REFERRAL TO ARBITRATION.

(1) Authority of Assigned Judge.

a. Every action subject to this Rule shall be assigned, upon filing, to a judge in accordance with the Court's assignment plan.

b. The assigned judge shall have authority, in his discretion, to conduct status and settlement conferences, hear motions and in all other respects supervise the action notwithstanding its referral to arbitration.

c. Pursuant to Federal Rule of Civil Procedure 16(b), the district judge shall enter a scheduling order. However, deadlines established by the scheduling order do not relieve the parties of compliance with scheduled arbitration proceedings.

d. Applications for reopening of any arbitration hearing may be granted by the district judge upon good cause shown.

(2) Relief From Referral. At any time prior to the expiration of the twenty day period following the filing of the last responsive pleading, the Court sua sponte or upon motion by any party may grant relief from the operation of this Rule. Such motion shall conform to Local Rule CV-7 and shall be supported by a memorandum and, if appropriate, declarations showing good cause. The assigned judge may, in his discretion, exempt an action from application of this Rule if he finds the existence of significant complex or novel questions of law, the predominance of legal issues over factual issues, or other grounds for finding good cause.

(e) ASSIGNMENT AND COMPENSATION OF ARBITRATORS.

(1) Selection of Panel. Whenever an action is referred to arbitration pursuant to this Rule, the clerk shall forthwith furnish to each party a list of five arbitrators whose names shall have been selected from the roster of arbitrators maintained in the clerk's office. The parties shall then confer for the purpose of selecting a panel of three arbitrators in the following manner:

a. Each side shall be entitled to strike one name from the list. Failure of counsel to timely notify the clerk of strikes shall result in the clerk's selection of the panel.

b. The clerk shall promptly notify the three persons whose names are not struck. If any person so selected is unable or unwilling to serve, the clerk shall select an additional name who shall constitute the third member of the panel. If the clerk is still unable to constitute a panel of three arbitrators for any reason, the process of selection under this rule shall begin anew. When three of the selected arbitrators have agreed to serve, the clerk shall promptly send written notice of the membership of the panel to each arbitrator and to the parties.

(2) Disqualification. No person shall serve as an arbitrator if any of the circumstances specified in 28 U.S.C. § 455 or the Code of Judicial Conduct exist, or if the arbitrator believes in good faith that such circumstances exist.

(3) Withdrawal by Arbitrator. Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his or her name removed or, if selected to serve on a panel, decline to serve but remain on the roster.

(4) Compensation and Reimbursement. Arbitrators shall be paid for each day or portion of a day of hearing in which they participate subject to limits set by the Judicial Conference. At the time when the arbitrators file their decision, each shall submit a voucher in a form prescribed by the clerk for payment by the Administrative Office of the United States Courts for compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing.

(5) Time of Service. After a person has served as an arbitrator in an action, he or she shall not serve again for at least four months.

(f) HEARING.

(1) Hearing Date.

a. The arbitration hearing shall begin no later than sixty (60) days after the filing of an answer. The arbitrators are authorized to change the date and time of the hearing provided the hearing is commenced within thirty (30) days of the hearing date set by the clerk. Any continuance beyond this thirty (30) day period must be approved by the judge to whom the case has been assigned. The clerk must be notified immediately of any continuance.

b. The filing of a motion to dismiss, motion for judgment on the join necessary parties or motion for summary judgment filed no later than the last answer, stays the arbitration process, unless the parties consent to proceed with arbitration.

(2) Default of Party. The arbitration hearing may proceed in the absence of any party who, after notice, fails to be present. If a party fails to participate in the arbitration process in a meaningful manner or fails to appear at the date and time of the scheduled arbitration hearing, the arbitrators may impose appropriate sanctions against the party or his attorney.

(3) Notice of Settlement. The parties shall advise the arbitrators in writing of settlement no later than 24 hours before the scheduled arbitration hearing. Failure to timely notify the arbitration clerk of settlement may result in imposition of sanctions, including but not limited to the expenses of unnecessarily impaneling the arbitration panel.

(4) Conduct of Hearing.

a. Testimony. The arbitrators are authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses except as herein provided. In receiving evidence, the arbitrators shall be guided by the Federal Rules of Evidence, but they shall not thereby be precluded from receiving evidence which they consider to be relevant and trustworthy and which is not privileged. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil Procedure.

b. Documentary Evidence. A party desiring to offer a document otherwise subject to hearsay objections at the hearing may serve a copy on the adverse party not less than ten days in advance of the hearing indicating his or her intention to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, any hearsay objection to the document shall be deemed waived.

c. Appearance of Counsel. All attorneys appearing at the arbitration hearing shall be licensed to practice in this District or otherwise request permission to proceed pursuant to Local Rule AT-1(f). Counsel in attendance at the arbitration hearing shall be familiar with the action and fully prepared to proceed.

~~**(5) Transcript of Recording.** A party may cause a transcript or recording to be made of the proceedings at its expense but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. In the absence of agreement of the parties and except as related to impeachment of a witness, no transcript of the proceedings shall be admissible in evidence at any subsequent trial de novo of the action.~~

~~**(6) Place of Hearing.** Hearings shall be held at any location within the Western District of Texas designated by the arbitrators. Hearings may be held in any courtroom or other room in any federal courthouse or office building made available to the arbitrators by the clerk's office. When no such room is available, the hearing shall be held at any other suitable location selected by the arbitrators. In making the selection, the arbitrators shall consider the convenience of the panel, the parties and the witnesses.~~

~~**(7) Time of Hearing.** Unless the parties agree otherwise, hearings shall be held during normal business hours.~~

~~**(8) Optional Waiver of Trial De Novo; Voluntary Arbitration.** At any time prior to the commencement of the hearing, the parties may by written stipulation approved by order of the assigned judge, waive the right to a trial de novo following the award and proceed as in voluntary arbitration. In the event of such a stipulation, the provisions of state and federal law governing review of awards rendered in voluntary arbitration shall govern.~~

~~**(9) Authority of Arbitrators.** The arbitrators constituting the panel shall be authorized to administer oaths and affirmations; to grant continuances up to 30 days from the hearing date set by the clerk; conduct arbitration hearings and make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before them, including imposition of appropriate sanctions; and enter awards, including costs and attorneys' fees. Any two members of the panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.~~

~~**(10) Ex Parts** **Communication.** There shall be no ex parte communication between an arbitrator and any counsel or party on any matter relating to the action except for purposes of scheduling or continuing the hearing.~~

(g) AWARD AND JUDGMENT.

(1) Filing of Award. The arbitrators shall file their award with the clerk's office promptly following the close of the hearing, and in any event, not more than ten days following the close of the hearing. The clerk shall serve copies on the parties. The arbitration panel award shall be kept strictly confidential. No attorney nor party shall reveal the amount of the award to anyone, including the Court or the media. The arbitration panel award is not relevant to any subsequent litigation that may arise and may not be introduced into evidence.

(2) Form of Award. The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief, if any, awarded. It shall be in writing and (unless the parties stipulate otherwise) shall be signed by at least two members of the panel. No member shall participate in the award without having attended the hearing.

(3) Sealing of Award. The contents of any arbitration award shall be sealed by the clerk so as not to be made known to any judge who might be assigned to the case:

a. except as necessary for the Court to assess costs or attorneys' fees in any trial de novo;

b. until the Court has entered final judgment in the action or the action has been otherwise terminated; or

c. except for the purposes of preparing the report required by Section 903(b) of the Judicial Improvements and Access to Justice Act.

(4) Entry of Judgment on Award. The clerk shall, 2in accordance with Rule 58, Federal Rules of Civil Procedure, enter the award as the judgment of the Court after the time has expired for requesting a trial de novo. The judgment so entered shall have the same force and effect as a judgment of the Court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(h) TRIAL DE NOVO.

(1) Time for Demand. If either party files and serves a written demand for a trial de novo within thirty days of filing the award, the action shall proceed in the normal manner before the assigned judge.

(2) Limitation on Evidence. At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, except that statements made by a witness at the arbitration hearing may be used for impeachment only.

~~**(3) Costs.** Upon making a demand for trial de novo, the moving party, other than the United States, shall unless permitted to proceed in forma pauperis, deposit with the clerk of court an amount equal to the total arbitration fees for each arbitrator. The sum deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event that the party demanding a trial de novo does not obtain a more favorable result, the sum deposited shall be paid to the Treasury of the United States.~~

~~**(4) Review of Sanctions.** Any party aggrieved by the imposition of sanctions by the arbitration panel may obtain de novo review thereof by the district judge by filing a motion for review and depositing costs in an amount equal to the monetary sanctions imposed, if any, within 30 days of the entry of such sanctions. After resolution of the motion, the district judge shall in his discretion and in the interest of justice, direct the clerk to distribute the deposit to one or more parties, or to the United States Treasury consistent with his order. The United States Government shall be exempt from this requirement.~~

Comment

The Western District of Texas was authorized to participate in the experiment with court annexed arbitration established by Congress in the Judicial Improvements and Access to Justice Act. *See* 28 U.S.C. § 658(1). Local Rule CV-87 was adopted to provide a court annexed arbitration program in the Western District and was successfully used for several years in the San Antonio and Austin divisions. However, the Advisory Committee has been informed by the Clerk of Court that the court annexed arbitration program provided for in CV-87 is no longer being used. This is a function of lack of funding and little ongoing interest in the program. In the interest of simplifying and streamlining the local rules, the Committee recommends that this obsolete rule be eliminated from the Local Rules.

RULE CV-88. ALTERNATIVE DISPUTE RESOLUTION

(a) ADR Methods Available. The Court recognizes these ADR methods: early neutral evaluation, mediation, minitrial, moderated settlement conference, summary jury trial, and arbitration. The Court may approve any other ADR method the parties suggest or the Court believes is suited to the litigation.

(b) ADR Report. Upon order of the Court entered early in the case, the parties shall submit a report addressing the status of settlement negotiations, disclosing the identity of the person responsible for settlement negotiations for each party, and evaluating whether alternative dispute resolution is appropriate in the case. Counsel shall certify in the report that their clients have been informed of the ADR procedures available in this district. In the event the parties conclude that ADR is appropriate and agree upon a method of ADR and ~~a neutral or neutrals~~, an ADR provider, they should identify both the method of ADR and the ~~neutral~~ provider they have selected, the method by which the ~~neutral~~ provider was selected, and how the ~~neutral~~ provider will be compensated. ~~If the parties agree upon an ADR method and neutral, the Court will defer to the parties, agreement unless the Court finds that another ADR method or neutral is better suited to the case or the parties.~~

~~(b)~~ (c) Referral to ADR. ~~The Court on its own motion or upon the motion of either party may order the parties to participate in a nonbinding alternative dispute resolution proceeding, including nonbinding arbitration, an early neutral evaluation, or a mediation, minitrial, or moderated settlement conference. The order may further direct the parties to bear all expenses relating to alternative dispute resolution proceedings in such amounts and such proportions as the Court finds appropriate, but in no event should apportioning of costs constitute a penalty for failing to arrive at a settlement. The alternative dispute resolution proceeding shall begin at a date and time selected by the neutral or neutrals, but in no event later than 45 days after the entry of the order compelling participation in the proceeding.~~ The Court may refer a case to ADR on the motion of a party, on the agreement of the parties, or on its own motion; however, the Court may refer a case to arbitration only with the consent of the parties (including but not limited to their consent by contract to arbitration). If the parties agree upon an ADR method or provider, the Court will respect the parties' agreement unless the Court determines that another ADR method or provider is better suited to the case and parties. If the parties are unable to agree on an ADR provider, the Court will select a provider.

~~(c)~~ (d) Attendence; Authority to Settle. ~~Party representatives with authority to negotiate a settlement and all other persons necessary to negotiate a settlement must attend the ADR proceeding.~~ In addition to counsel, party representatives with authority to negotiate a settlement, and all other persons necessary to negotiate a settlement, including insurance carriers, must attend the ADR session.

(e) Fees. The provider and the litigants will determine the fees for the ADR. The Court reserves the right to review the reasonableness of the fees. If the provider and litigants are unable to agree, the Court will determine an appropriate fee.

~~(d)~~ (f) Certification and List of ~~Neutrals~~ Providers.

(1) The Court will appoint three members in each division to a standing panel ~~in each division~~ on ADR ~~neutrals~~ providers and designate one member as chairperson. The panel will review applications from providers and annually prepare a roster of those qualified under the criteria contained in this rule. ~~This roster shall be maintained separately from the list of arbitrators maintained in the Office of the Clerk pursuant to Local Rule CV-87.~~

~~**(1)**~~ **(2)** To be eligible for listing, ~~on the roster of neutrals provided for by this rule,~~ ~~neutrals~~ providers must meet the following minimum qualifications:

a. the person must be a member of the bar of the United States District Court for the Western District of Texas; and

b. the person must have been a member of the bar of the highest court of any state or the District of Columbia for at least five years; and

c. the person must have completed at least forty hours training in dispute resolution techniques in an alternative dispute resolution course approved by the State Bar of Texas Minimum Continuing Legal Education Department or the federal courts, or ~~has~~ have been a judge of a court of record in the State of Texas.

(3) A ~~neutral~~ provider denied listing may request a review of that decision.

(4) The Court may appoint and parties may select by agreement a provider who is not on the list.

~~**(e) Selection of Neutral.** Upon entry of an order compelling participation in alternative dispute resolution, the Clerk shall forthwith furnish to each party a list of neutrals. If the compelled procedure is nonbinding arbitration or moderated settlement conference, the list shall include five neutrals whose names have been selected from the roster of neutrals maintained in the Clerk's Office. If the compelled procedure is other than nonbinding arbitration or moderated settlement conference, the list shall include three neutrals selected from this same roster. The parties shall then confer with each side entitled to strike one name from the list. The parties may by agreement reject the list furnished by the Clerk and instead select a neutral or neutrals from the roster. Failure of counsel to timely notify the Clerk of their strikes or selection shall result in the selection of the neutral or neutrals by the Clerk.~~

~~The Clerk shall promptly notify the neutral or neutrals selected. If any person selected is unable or unwilling to serve the Clerk shall submit an additional list of names to the parties until a neutral or complete panel of neutrals is selected. When a neutral or full panel of neutrals have been selected and have agreed to serve, the Clerk shall promptly notify the neutral or neutrals and the parties of the selection.~~

~~No person shall serve as a neutral if any of the circumstances specified in 28 U.S.C. § 455 of the Judicial Code of Conduct exist, or if the neutral believes in good faith that such circumstances exist. Any person whose name appears on the roster maintained in the Clerk's Office may ask at any time to have his or her name removed, or, if selected to serve in any case, decline to serve but remain on the roster.~~

~~Upon its own motion or upon motion and showing of good cause by any party, the Court may order appointment of a neutral or neutrals from outside the roster of qualified neutrals maintained by the Clerk's Office.~~

(g) Disqualification. No person shall serve as a provider if any of the circumstances specified in 28 U.S.C. § 455 of the Judicial Code of Conduct exist, or if the provider believes in good faith that such circumstances exist.

~~(f)~~ (h) Relief from Referral. A party opposing either the ADR referral or the appointed provider must file written objections with the Court within ten (10) days of receiving notice of the referral or provider. Any party may obtain relief from an order ~~compelling participation in an alternative dispute resolution proceeding~~ upon a showing of good cause. Good cause may include a showing that the expenses relating to alternative dispute resolution would cause undue hardship to the party seeking relief from the order. In that event, the Court may in its discretion appoint a ~~neutral or neutrals to provide ADR services without fee and at no cost to the party or parties~~ provider from the list of providers to serve at a reduced fee, or without fee, and at no cost to the party or parties.

~~(g)~~ (i) Confidentiality. Except as otherwise provided herein, or as agreed by the participants, a communication relating to the subject matter of any civil or criminal dispute made by any participant ~~in~~ during an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, may not be disclosed, ~~is not subject to disclosure, and~~ may not be used as evidence against the participant in any judicial or administrative proceeding, and does not constitute a waiver of any existing privileges or immunities.

(1) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring the disclosure of confidential information or data relating to or arising out of the matter in dispute.

(2) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(3) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the Court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and

context of the communications or materials sought to be disclosed warrant a protective order of the Court or whether the communications or materials are subject to disclosure.

~~(h)~~ (j) Summary Jury Trial. In cases where alternative dispute resolution procedures have proved unsuccessful and a complex and lengthy trial is anticipated, the Court may conduct a summary jury trial provided that the Court finds that a summary jury trial may produce settlement of all or a significant part of the issues and thereby effect a saving in time, effort and expense for all concerned and provided the parties consent to the procedure. The Court should develop procedures for such summary jury trial with the advice of counsel.

~~(i)~~ (k) Final ADR Report. At the conclusion of each ADR proceeding, the ~~neutral or panel of neutrals~~ provider shall submit to the Court a notice of outcome, including the style and number of the case, the type of case, the method of ADR, ~~and~~ whether the case has settled, and the provider's fees.

~~(j)~~ (l) Sanctions. The sanctions available under Federal Rule of Civil Procedure 16(f) shall apply to any violation of this rule.

Comments

1. The Alternative Dispute Resolution Act of 1998 (the "Act") requires each federal district court to adopt a local rule authorizing the use of alternative dispute resolution procedures in all civil cases. *See* 28 U.S.C. §§ 651-658. Local Rule CV-88 largely (although not completely) complies with the requirements of the Act. The proposed amendments to Local Rule CV-88 are designed to streamline the local rule by eliminating unnecessary complexity and to ensure that the local rule complies with the Act. The requirements of the Act and the proposed revisions to CV-88 that are recommended to ensure compliance with the requirements of the Act are as follows:

(1) The local rule must require that "litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation." *See* 28 U.S.C. § 652(a).

Proposed Local Rule CV-88 satisfies this requirement. Specifically, proposed CV-88(b) provides that "[u]pon order of the Court entered early in the case, the parties shall submit a report addressing the status of settlement negotiations, disclosing the identiy of the person responsible for settlement negotiations for each party, and evaluating whether alternative dispute resolution is appropriate in the case." Under the form scheduling order recommended in connection with proposed Local Rule CV-16, the first deadline faced by the parties is submission of an ADR report in compliance with CV-88.

(2) The local rule must provide "litigants in all civil cases with at least one alternative dispute resolution process." *See* 28 U.S.C. § 652(a).

Proposed Local Rule CV-88(a) satisfies this requirement by providing litigants with several alternative dispute resolution options, including "early neutral evaluation, mediation, minitrial, moderated settlement conference, summary jury trial, and arbitration."

(3) The local rule must provide "for the confidentiality of the alternative dispute resolution processes" and "prohibit disclosure of confidential dispute resolution communications." *See* 28 U.S.C. § 652(d).

Proposed Local Rule CV-88(I) specifically addresses and satisfies this requirement.

(4) The local rule must provide "appropriate processes for making neutrals available for use by the parties for each category of process offered." *See* 28 U.S.C. § 653(a).

The provisions of proposed Local Rule CV-88(f) satisfy this requirement by establishing minimum qualifications for neutrals as well as a procedure for creating a roster of qualified neutrals.

(5) The local rule must provide for the qualification and disqualification of neutrals. *See* 28 U.S.C. § 653(b).

Proposed Local Rules CV-88(f) and (g) satisfy this requirement by establishing the minimum qualifications for neutrals and standards for the disqualification of neutrals.

(6) Subject to regulations approved by the Judicial Conference of the United States, the local rule must "establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case." *See* 28 U.S.C. § 658.

The Committee on Court Administration and Case Management of the Judicial Conference of the United States recommends that the Court not provide for court-funded ADR neutrals because Congress has not provided funding for payment of such neutrals. The Committee has further recommended that when an ADR program provides for compensation of neutrals by the parties, the Court should make explicit the rate of and limitations upon compensation.

Given the difficulty of establishing a fixed rate of compensation that would apply appropriately throughout the Western District, the Advisory Committee recommends that the Western District comply with the Act by instead specifying a process for determining the compensation of neutrals. In cases where the parties voluntarily participate in an ADR process, proposed CV-88 anticipates that the parties would agree among themselves regarding "how the neutral will be compensated." In cases where the Court compels the parties to participate in an ADR process, the parties will ordinarily agree with the neutral on a rate of compensation, subject to discretionary

review by the court for reasonableness. However, when the parties and neutral are unable to agree, the Court would determine the level of compensation.

(7) The local rule may exempt "specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate." In defining the exemptions, the court must "consult with members of the bar, including the United States Attorney for that district." *See* 28 U.S.C. § 652(b).

Under proposed Local Rule CV-16, scheduling orders are not issued in those cases exempt from mandatory disclosure requirements under proposed Federal Rule 26, as well as several additional categories of cases. The order referred to in CV-88(a) requiring the parties to consider ADR alternatives and to submit a report is issued only in cases where the Court issues a scheduling order. As a consequence, the order requiring an ADR report will not be issued in those cases exempt from the scheduling order requirement. This is appropriate because the same factors that suggest certain categories of cases should be exempt from scheduling orders. (such as prisoner suits under section 2255) would suggest that those same actions should also be exempt from the requirement of an ADR report.

2. Under the Act, arbitration may be one of the alternative dispute resolution procedures provided, but a case may not be referred to arbitration without the consent of the parties. *See* 28 U.S.C. § 652(a). Even with the consent of the parties, certain categories of cases may not be referred to arbitration. These categories include (1) cases involving allegations of constitutional violations, (2) cases in which jurisdiction is based in whole or in part on 42 U.S.C. 1344, and (3) cases where the relief sought exceeds $150,000. In its present form, CV-88 authorizes the Court to compel parties to participate in nonbinding arbitration. To ensure compliance with the Act, the Advisory Committee recommends that the Court delete the provisions of CV-88 that presently would authorize the Court to compel participation in other ADR processes, including nonbinding arbitration.

SECTION IV - APPENDICES

APPENDIX "A"
INFORMATION REQUIRED - MOTION FOR CLASS ACTION CERTIFICATION

When a class action allegation is set forth in a complaint, the plaintiff is directed to file within thirty (30) days after any defendant's first pleading is filed a motion for class action certification; otherwise, the request for class action certification is considered waived. Said motion to include but not limited to the following:

(1) A brief statement of the case.

(2) A statement defining the class plaintiff seeks to have certified including its geographical and temporal scope.

(3) A description of plaintiff's particular grievance and why that claim qualifies plaintiff as a member of the class as defined.

(4) Does the plaintiff contend that this action may be maintained under Rule 23(b)(1)? Under Rule 23(b)(2)? Under Rule 23(b)(3)? Explain why any section contended for is appropriate.

(5) A statement respecting the four prerequisites of Federal Rules of Civil Procedure 23(a). The statement shall set forth:

a. The anticipated number of class members and how this number was determined.

b. The common questions of law and/or fact involved.

c. The reasons why plaintiff's claim is typical of those of the other class members.

d. The reason why representation by the named plaintiff is adequate to protect the interests of the class. This part of the statement shall specifically answer the following questions:

(i) Is the claim of the named plaintiff presently or potentially in conflict with that of any members of the class?

(ii) Will the claims of the class require sub-classes presently or in the future?

(iii) What is the prior experience of counsel for the plaintiff that would indicate capability to handle the lawsuit?

(iv) Is counsel presently representing or has he at any time represented, a class in any other class action, and if so, when and how many instances?

(v) How many cases is plaintiff's counsel now handling in which class action allegations are made?

(6) A statement describing any other pending actions in any court against the defendants alleging the same or similar causes of action.

(7) A statement that the attorney for the named plaintiff has discussed and thoroughly explained to the plaintiff the nature of a class action and potential advantages and disadvantages to the named plaintiff by proceeding in a class action rather than individually.

(8) A statement of the proposed notices to the members of the class and how and when the notices will be given, including a statement regarding security deposit for the cost of notices.

(9) A description of the extent of any settlement negotiations that have taken place and the likelihood of settlement with the named plaintiff on an individual basis. If such settlement is likely, include a statement specifying:

a. Whether or not counsel have any knowledge of any person who has relied on the fact that this suit was initially filed as a class action.

b. The manner in which counsel will protect the class in the event of settlement with the named plaintiff on an individual basis.

(10) A statement of any other matters that the plaintiff deems necessary and proper to the expedition of a decision on the motion and the speedy resolution of the case on the merits. Defendant shall serve and file a Motion in Opposition to the Plaintiff's Motion consistent with Rule CV-7(d).

Comment

Local Rule CV-23 provides that a motion for class certification shall be filed within 30 days after any defendant's first pleading. The Committee recommends that Appendix A be amended to clarify that the procedure described in the appendix conforms to the procedure specified in the local rule.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
_____ DIVISION

_____,	§	
Plaintiff,	§	
	§	
VS.	§	NO._____
	§	
	§	
_____,	§	
Defendant.		

SCHEDULING ORDER

Pursuant to Rule 16, Federal Rules of Civil Procedure, the Court issues the following Scheduling Order:

1. A report on alternative dispute resolution in compliance with Local Rule CV-88 shall be filed by _____.

~~2. The parties shall advise if they agree the case is to be placed on the Expedited docket and whether they consent to trial by the Magistrate Judge by _____. If such consent is given, the form set out in Appendix B-4 shall be used.~~

2. The parties asserting claims for relief shall submit a written offer of settlement to opposing parties by _____, and each opposing party shall respond, in writing, by _____.

3. The parties shall file all motions to amend or supplement pleadings or to join additional parties by _____.

4. All parties asserting claims for relief shall designate their potential witnesses, testifying experts, proposed exhibits, and submit a written report of the expected testimony of each expert by _____. Parties resisting claims for relief shall designate their potential witnesses, testifying experts, proposed exhibits, and submit a written report of the expected testimony of each expert by _____. All rebuttal experts shall be designated ~~by _____~~ within 15 days of receipt of the report of the opposing expert.

5. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within ___ days of receipt of the written report of the expert's proposed testimony, or within ___ days of the expert's deposition, if a deposition is taken, whichever is later.

6. The parties shall complete all discovery on or before _____. Counsel may by agreement continue discovery beyond the deadline, but there will be no intervention by the Court except in extraordinary circumstances, and no trial setting will be vacated because of information obtained in post-deadline discovery.

7. All dispositive motions shall be filed no later than _____. Dispositive motions as defined in Local Rule CV-7(h) and responses to dispositive motions shall be limited to ____ pages in length.

8. This case is set for trial [docket call, or jury selection] on _____ at _____ ___.m. The parties should consult Local Rule CV-16(e) regarding matters to be filed in advance of trial. ~~The parties shall file a joint proposed pretrial order at least fourteen (14) days before that date (See Form PT-1, Appendix B-2 to the Local Rules, for a suggested form of Pretrial Order).~~

SIGNED AND ENTERED this _____ day of _____, 20_____

_____

UNITED STATES DISTRICT JUDGE

Comments

1. Elimination of the Expedited Docket pursuant to the proposed amendments to CV-16 would require deleting the reference to that docket in the second paragraph of the current form scheduling order. Setting an early deadline for consenting to trial by Magistrate Judge has the potential effect of discouraging parties from consenting to such trials. For this reason, the Advisory Committee recommends that the deadline for such consents provided in the current scheduling order be eliminated.

2. Likewise, the proposed amendment to CV-16 that would eliminate the need for proposed pretrial orders eliminates the need for the language referring to such orders to the current form of scheduling order.

3. The decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has created a great deal of uncertainty for lawyers regarding the admissibility of expert opinion testimony. This uncertainty creates the potential for unfairly surprising an attorney who reasonably but incorrectly believes expert testimony will meet the reliability standard articulated in *Daubert*. An opposing party might first assert the *Daubert* objection at trial, when it is too late for the proponent of the testimony to secure alternative proof. For this reason, the Advisory Committee recommends that the Court require reliability objections to expert witness testimony to be made in advance of trial and prior to the proponent's deadline for locating and designating an alternative expert. More specifically, the Committee recommends adding a paragraph to the proposed standard scheduling order that provides a deadline in advance of the discovery deadline for making reliability challenges to the testimony of a designated expert. At least one judge in the Western District already includes a similar provision setting pretrial deadlines for raising these objections in his current scheduling order.

Several members of the Advisory Committee have expressed concerns regarding this recommendation. One concern is that a general reference to *Daubert* objections in the scheduling order may not identify with sufficient precision exactly what objections to expert opinion testimony must be asserted in advance of trial. The Supreme Court in *Daubert* articulated a reliability standard that must be satisfied before expert opinion testimony is admissible under Rule 702 of the Federal Rules of Evidence. However, the Court also discussed the Rule 702 "helpfulness" requirement, which goes primarily to the relevance of the proposed expert opinion testimony. Simply referring to *Daubert*

objections in the scheduling order might suggest that "reliability" objections as well as "helpfulness" objections must be made in advance of trial or waived. Given that in many instances "helpfulness" objections cannot be determined outside the context of the evidence that has been introduced at trial, requiring these objections to be made well in advance of trial would be inappropriate. For this reason, the Committee recommends that the scheduling order refer specifically to "reliability" objections under Rule 702 of the Federal Rules of Evidence rather than a more general reference to *Daubert* objections.

A second concern is that requiring reliability objections to be made in advance of trial may be inconsistent with the Federal Rules and thus may be an unenforceable requirement. Generally, objections to evidence are timely as long as they are made before the evidence is introduced. Rule 26 of the Federal Rules of Civil Procedure creates a limited exception to this general rule. Under this limited exception, objections (other than relevance objections) to the admissibility of documents that a party has disclosed under the pretrial disclosure provisions of Rule 26(a)(3) must be disclosed within a specified period before trial. Arguably, by not including objections to the admissibility of expert opinion testimony within this limited exception, the Supreme Court has made an implicit decision that these objections need not be disclosed in advance of trial. If this is the case, a local rule mandating that reliability objections to expert opinion testimony be made in advance of trial would be inconsistent with the Federal Rules, in violation of Federal Rule of Civil Procedure 83 and the Federal Rules Enabling Act. *See* 28 U.S.C. § 2072. On the other hand, courts may conclude that this implicit conflict is not sufficiently direct to violate the Federal Rules or the Enabling Act. This is an issue that will undoubtedly be litigated and ultimately resolved by the Fifth Circuit if the proposed scheduling order is adopted.

A third concern is that experience may reveal circumstances when it would be unreasonable to preclude a party from making a reliability objection to expert opinion testimony at trial, even though that party had failed to make any pretrial objection. However, as with any other provision of the scheduling order, a party may establish "good cause" for failing to act within the schedule. *See* FED. R. CIV. P. 16(b).

A fourth concern relates to the procedure to be employed by the Court when *Daubert* objections are determined in advance of trial One alternative is to determine *Daubert* objections without the need for a hearing. The court would determine the objection based on written material submitted in support of and in opposition to the motion, including affidavits and deposition excerpts. To the extent circumstances permit the Court to determine *Daubert* objections without conducting a hearing, the Court is encouraged to do so. Pretrial hearings on *Daubert* objections can be quite expensive for the parties, especially if experts are required to appear and testify. *See generally United States v. Katz*, 178 F.3d 368, 371 (5th Cir. 1999)(expressing concern over amount of judicial resources devoted to pretrial *Daubert* evidentiary hearings in that case). For this reason, the Court should not reflexively conduct pretrial evidentiary hearings to determine *Daubert* motions. To this end, parties should be required to support pre-trial *Daubert* motions and responses with affidavits and excerpts of deposition testimony. The Committee recognizes, however, that an evidentiary hearing will sometimes provide the best environment for making the inquiry *Daubert* requires. *See generally Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). Indeed, in some circumstances the failure to conduct an evidentiary hearing on a *Daubert* objection may be an

abuse of discretion. *See Padillas v. Stork-Gamco, Inc*., 186 F.3d 412 (3d Cir. 1999). Rather than attempt to address this issue by proposed local rule, the Advisory Committee recommends that the Court continue to explore different procedures for making pretrial determinations of *Daubert* objections.

A final concern deals with preservation of error and the need to reassert reliability objections at trial, despite the Court's pretrial disposition of those objections. To the extent pretrial objections to the reliability of expert opinion testimony are really a form of motion in limine, the Court's ruling on the objection would not eliminate the need to reassert the objection when the evidence is offered at trial (or to offer the evidence at trial, despite a pretrial ruling granting the motion). *See, e.g., Rojas v. Richardson*, 703 F.2d 186, 188-189 (5th Cir. 1983). However, a proposed amendment to Rule 103 of the Federal Rules of Evidence would obviate this concern by eliminating the need for reassertion of objections and offers of proof at trial when the Court makes the definitive pretrial ruling on an evidentiary issue in connection with a motion in limine. That amendment is likely to take effect on December 1, 2000.

APPENDIX "B-2"

Pre-Trial Order Check List - Form PT-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
_____DIVISION

_____
Plaintiff

vs. Civil Action No._____

_____
Defendant

PRE-TRIAL ORDER

A pre-trial conference was held in the above entitled cause before Honorable _____, on the _____ day of _____, 20____. _____ appeared as counsel for plaintiff. _____ appeared as counsel for defendant.

1. The following jurisdictional questions were raised and disposed of as hereinafter indicated: (set out)

2. The following disposition was made of pending motions or other similar matters preliminary to trial: (set out)

3. In general, the plaintiff claims: (set out)

4. In general, the defendant claims: (set out)

5. The following facts and issues not in genuine dispute are established by the pleadings or are established by the stipulations or admissions of counsel: (set out)

6. The contested issues of fact are: (set out)

7. The contested issues of law are: (set out)

8. The following exhibits were marked and received in evidence:

Plaintiff's exhibits (list on separate sheet) Defendant's exhibits (list on separate sheet) Except as otherwise indicated, the authenticity of the exhibits on the accompanying lists has been stipulated, but they are to be received subject to objections by the opposing party, if any, at the pre-trial conference, to their relevance and materiality. If other exhibits are to be offered and their necessity can be reasonably anticipated, they will be submitted to opposing counsel at least ten days prior to trial. Written stipulations with reference to all exhibits exchanged or identified have been prepared as required by Local Rule CV-26.

9. Proposed jury instructions and verdict forms on behalf of each party are attached hereto.

10. All amended pleadings have been filed.

11. The following additional matters, to aid in the disposition of the action were determined. (set out)

12. The probable length of trial of this case is _____ days.

13. If a non-jury case, the proposed findings of fact and conclusions of law of each party are attached hereto.

14. A list of the names of all witnesses (except those to be used for impeachment only) for each party, together with a brief statement as to what their testimony will be, is attached hereto.

15. All discovery in this case has been completed.

16. An attorney's conference, as required by Order Preliminary to Pre-Trial Conference, was held on _____.

17. Each party has advised the other with respect to all deposition questions and answers to be offered in evidence, and objections thereto have been furnished and are ready for presentation to the Court at the pre-trial conference.

18. Memorandum briefs have been furnished to the Court and opposing counsel with respect to all unusual questions of law.

19. A list of questions each party desires the Court to ask prospective jurors on voir dire examination is attached hereto.

20. The parties hereto are (are not) willing to enter into an agreement with reference to the disqualification of jurors.

~~21. Counsel for all parties have familiarized themselves with respect to the Local Court Rules, particularly Rules AT-3, AT-5, CV-7 and CV-16.~~

~~22. Counsel participating in the pre-trial procedures have full authority to accomplish the purpose of Rule 16, Federal Rules of Civil Procedure, and Local Rule CV-16.~~

~~23. Non-resident counsel have designated a local attorney as may be required by Local Rule AT-3.~~

~~24. All parties are (are not) ready for pre-trial and trial.~~

~~25. The possibility of a compromise settlement has been fully discussed and explored.~~

~~26. This case was ordered set down on the (non-jury) (jury) calendar for _____.~~

~~27. No definite setting was made but it is estimated that it will be reached for trial about _____.~~

~~Dated this _____ day of _____, 20_____, at _____, Texas.~~

~~_____~~
~~United States District Judge~~

~~APROVED:~~

~~_____~~
~~Counsel for Plaintiff~~

~~_____~~
~~Counsel for Defendant~~

Comment

The proposed revisions to Local Rule CV-16 eliminate the need for Appendix B-2.

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
_____ DIVISION

_____,	§	
Plaintiff,	§	
	§	
	§	No._____
	§	
_____,	§	
Defendant.	§	

PROTECTIVE ORDER

Upon motion of all the parties for a Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure,

It is hereby ORDERED that:

1. All Classified Information produced or exchanged in the course of this litigation shall be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever, and shall not be disclosed to any person except in accordance with the terms hereof.

2. "Classified Information," as used herein, means any information of any type, kind or character which is designated a "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by any of the supplying or receiving parties, whether it be a document, information contained in a document, information revealed during a deposition, information revealed in an interrogatory answer or otherwise. In designating information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), a party will make such designation only as to that information that it in good faith believes contains confidential information. Information or material which is available to the public, including catalogues, advertising materials, and the like shall not be classified.

3. "Qualified Persons," as used herein means:

(a) Attorneys of record for the parties in this litigation and employees of such attorneys to whom it is necessary that the material be shown for purposes of this litigation;

(b) Actual or potential independent technical experts or consultants, who have been designated in writing by notice to all counsel prior to any disclosure of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes only") information to such person, and who have signed a document so stating (such signed document to be filed with the Clerk of this Court by the attorney retaining such person);

(c) The party or one ~~(1) "in-house" corporate officer or employee of a corporate~~ party representative (in cases where the party is a legal entity) who shall be designated in writing by the ~~corporate~~ party prior to any disclosure of "Confidential" information to such person and who shall sign a document so stating (such signed document to be filed with the Clerk of this Court by the party designating such person); and

(d) If this Court so elects, any other person may be designated as a Qualified Person by order of this Court, after notice and hearing to all parties.

4. Documents produced in this action may be designated by any party or parties as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes only") information by marking each page of the document(s) so designated with a stamp stating "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only").

In lieu of marking the original of a document, if the original is not produced, the designating party may mark the copies that are produced or exchanged. Originals shall be preserved for inspection.

5. Information disclosed at (a) the deposition of a party or one of its present or former officers, directors, employees, agents or independent experts retained by counsel for the purpose of this litigation, or (b) the deposition of a third party (which information pertains to a party) may be designated by any party as "Confidential" or "For Counsel Only" ("or Attorneys' Eyes Only") information by indicating on the record at the deposition that the testimony is "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") and is subject to the provisions of this Order.

Any party may also designate information disclosed at such deposition as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by notifying all of the parties in writing within thirty (30) days of receipt of the transcript, of the specific pages and lines of the transcript which should be treated as

"Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") thereafter. Each party shall attach a copy of such written notice or notices to the face of the transcript and each copy thereof in his possession, custody or control. All deposition transcripts shall be treated as "For Counsel Only" (or "Attorneys' Eyes Only") for a period of thirty (30) days after the receipt of the transcript.

To the extent possible, the court reporter shall segregate into separate transcripts information designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), with blank, consecutively numbered pages being provided in a non-designated main transcript. The separate transcript containing "Confidential" and/or "For Counsel Only" (or "Attorneys' Eyes Only") information shall have page numbers that correspond to the blank pages in the main transcript.

6. (a) "Confidential" information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons. Information designated as "For Counsel Only" (or "Attorneys' Eyes Only") shall be restricted in circulation to Qualified Persons described in Paragraphs 3(a) and (b) above.

(b) Copies of "For Counsel Only" (or "Attorneys' Eyes Only") information provided to a receiving party shall be maintained in the offices of outside counsel for Plaintiff(s) and Defendant(s). Any documents produced in this litigation, regardless of classification, which are provided to Qualified Persons of Paragraph 3 (b) above, shall be maintained only at the office of such Qualified Person and only working copies shall be made of any such documents. Copies of documents produced under this Protective Order may be made, or exhibits prepared by independent copy services, printers or illustrators for the purpose of this litigation.

(c) Each party's outside counsel shall maintain a log of all copies of "For Counsel Only" (or "Attorneys' Eyes Only") documents which are delivered to any one or more Qualified Person of Paragraph 3 above.

7. Documents previously produced shall be retroactively designated by notice in writing of the designated class of each document by Bates number within thirty (30) days of the entry of this order. Documents unintentionally produced without designation as "Confidential" may be retroactively designated in the same manner and shall be treated appropriately from the date written notice of the designation is provided to the receiving party.

Documents to be inspected shall be treated as "For Counsel Only" (or "Attorneys' Eyes Only") during inspection. At the time of copying for the receiving parties, such inspected documents shall be stamped prominently "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by the producing party.

8. Nothing herein shall prevent disclosure beyond the terms of this order if each party designating the information as "Confidential" or "For Counsel Only" (or Attorneys' Eyes Only") consents to such disclosure or, if the court, after notice to all affected parties, orders such disclosures. Nor shall anything herein prevent any counsel of record from utilizing "Confidential" or "For Counsel Only" (or "Attorneys' Eyes only") information in the examination or cross-examination of any person who is indicated on the document as being an author, source or recipient of the "Confidential" or "For Counsel Only (or "Attorneys' Eyes Only") information, irrespective of which party produced such information.

9. A party shall not be obligated to challenge the propriety of a designation as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") at the time made, and a failure to do so shall not preclude a subsequent challenge thereto. In the event that any party to this litigation disagrees at any stage of these proceedings with the designation by the designating party of any information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), or the designation of any person as a Qualified Person, the parties shall first try to resolve such dispute in good faith on an informal basis, such as production of redacted copies. If the dispute cannot be resolved, the objecting party may invoke this Protective Order by objecting in writing to the party who has designated the document or information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"). The designating party shall be required to move the Court for an order preserving the designated status of such information within fourteen (14) days of receipt of the written objection, and failure to do so shall constitute a termination of the restricted status of such item.

The parties may, by stipulation, provide for exceptions to this order and any party may seek an order of this Court modifying this Protective Order.

10. Nothing shall be designated as "For Counsel Only" (or "Attorneys' Eyes Only") information except information of the most sensitive nature, which if disclosed to persons of expertise in the area would reveal significant technical or business advantages of the producing or designating party, and which includes as a major portion subject matter which is believed to be unknown to the opposing

party or parties, or any of the employees of the corporate parties. Nothing shall be regarded as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information if it is information that either:

(a) is in the public domain at the time of disclosure, as evidence by a written document;

(b) becomes part of the public domain through no fault of the other party, as evidenced by a written document;

(c) the receiving party can show by written document that the information was in its rightful and lawful possession at the time of disclosure; or

(d) the receiving party lawfully receives such information at a later date from a third party without restriction as to disclosure, provided such third party has the right to make the disclosure to the receiving party.

11. In the event a party wishes to use any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in any affidavits, briefs, memoranda of law, or other papers filed in Court in this litigation, such "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information used therein shall be filed under seal with the Court.

12. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony and answers to interrogatories, admissions and other pleadings filed under seal with the Court in this litigation which have been designated, in whole or in part, as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by a party to this action.

13. Unless otherwise agreed to in writing by the parties or ordered by the Court, all proceedings involving or relating to documents or any other information shall be subject to the provisions of this order.

14. Within one-hundred twenty (120) days after conclusion of this litigation and any appeal thereof, any document and all reproductions of documents produced by a party, in the possession of any of the persons qualified under Paragraphs 3(a) through (d) shall be returned to the producing party, except as this Court may otherwise order or to the extent such information was used as evidence at the trial. As far as the provisions of any protective orders entered in this action restrict the communication and use of the documents produced thereunder, such orders shall continue to be binding after the

conclusion of this litigation, except (a) that there shall be no restriction on documents that are used as exhibits in Court unless such exhibits were filed under seal, and (b) that a party may seek the written permission of the producing party or. order of the Court with respect to dissolution or modification of such protective orders.

15. This order shall not bar any attorney herein in the course of rendering advice to his client with respect to this litigation from conveying to any party client his evaluation in a general way of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced or exchanged herein; provided, however that in rendering such advice and otherwise communicating with his client, the attorney shall not disclose the specific contents of any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced by another party herein, which disclosure would be contrary to the terms of this Protective Order.

16. Any party designating any person as a Qualified Person shall have the duty to reasonably ensure that such person observes the terms of this Protective Order and shall be responsible upon breach of such duty for the failure of any such person to observe the terms of this Protective Order.

SIGNED AND ENTERED this _____ day of _____, 20___.

_____
UNITED STATES DISTRICT JUDGE